**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **In re:** | ) | |
| | ) | **Chapter 7** |
| **ATASHBEHARM CORPORATION, INC.** | ) | |
| | ) | |
| | ) | **Case No. 13-15306 (JKF)** |

**MOTION FOR ENTRY OF AN ORDER AUTHORIZING GARY F. SEITZ, CHAPTER 7 TRUSTEE, TO SELL CERTAIN ASSETS PURSUANT TO 11 U.S.C. § 363(b) AND TO APPROVE COMPROMISE WITH RAJANDRA PATEL, M.D. UNDER FED.BANKR.R.PROC. 9019**

Gary F. Seitz, Chapter 7 Trustee (the "Trustee") of Atashbeharm Corporation, Inc. ("Debtor"), by and through his undersigned counsel, respectfully moves this Court for the entry of an Order Authorizing The Trustee to Sell Certain Assets Pursuant to Section 363(b) and (f) of Title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code") and to Approve Compromise with Rajandra Patel, M.D. pursuant to Federal Rule of Bankruptcy Procedure 9019, and in support thereof the Trustee submits as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

2. On June 14, 2013, the Debtor filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code ("Filing Date").

3. The Debtor is a Pennsylvania corporation with a principal place of business located at 834 Chestnut Street, Philadelphia, Pennsylvania.

4. The Debtor operated its business as a full service restaurant serving authentic Indian Cuisine, located at 834 Chestnut Street, Philadelphia, Pennsylvania. The Debtor's restaurant, prior to filing for chapter 7 bankruptcy protection was called Palace on the Ben.

5. On June 17, 2013, Gary F. Seitz, was appointed by the Office of the United States Trustee as Chapter 7 Trustee ("Trustee") and has continued to serve in that capacity since.

6. On August 15, 2013, the Trustee concluded the 341 meeting of creditors. Based upon an independent investigation the Trustee established that the Debtor had an equity interest in various restaurant equipment and furniture including but not limited to, various tables, chairs, coolers, sinks, cookers, fryers, stoves, and touch screen terminals of Debtor (collectively, the "Sale Assets"). As such the Trustee sought out to sell the Sale Assets.

7. On or about November 19, 2013, the Trustee filed an application to employ Pennsylvania Liquor License Exchange as Sales Agent to market and assist with selling the Liquor License ("PLLE"). This Court entered an Order authorizing PLLE's retention on January 6, 2014.

8. On or about November 19, 2013, the Trustee filed an application to employ Quaker City Auctioneer, as Sales Agent and Auctioneer ("Quaker City"). This Court entered an order authorizing Quaker City's retention on December 6, 2013.

9. On December 5, 2013, pursuant to this Court's Order entered on December 4, 2013 [D.I. #42], the Trustee sold the Sale Asset at auction on December 5, 2013. The Debtor also has an interest in a Pennsylvania liquor license, R-1319; LID No. 56332 (the "Liquor License"). As such the Trustee sought out to sell the Debtor's interests in the Liquor License.

10. The largest secured creditor of the Debtor is Santander Bank, who alleges it is holding a blanket security interest over the Debtor's Sale Assets, pursuant to a UCC-1 financing statement, filed on December 4, 2006.

11. Santander Bank further claims to have a lien on the Debtors Liquor License, pursuant to a Stock Pledge and Security Agreement, executed on November 22, 2006, which purports to pledge a security interest in the Debtors Liquor License.

12. Rajandra Patel, M.D. ("Patel") also filed a UCC-1 financing statement on November 29, 2006 against the Sale Assets and alleges a security interest in the Liquor License.

13. Upon information and belief, based upon a search of the public record and the representations of counsel for Dr. Patel, a continuation statement was filed by Patel on November 29, 2008, with regard to his UCC-1 financing statement as to the Sale Assets.

14. Santander Bank, the UCC-1 financing statement lapsed on June 18, 2012. It is the position of Santander Bank that the lapse of the UCC-1 financing statement has no practical effect on Santander Bank's priority as a lien creditor: (a) because Santander retains its priority as to all lien creditors who obtained a lien prior to the lapse of the financing statement in accordance with 13 Pa.C.S.A. § 9515, comment ¶3 & ex. 2; *In re Aliquippa Mach. Co., Inc.*, 343 B.R. 145, 150, FN2 (Bankr. W.D. Pa. 2006); *also see In re Highland Constr. Mgmt. Servs., LP*, 497 B.R. 829, 838 (Bankr. E.D. Va. 2013) (which includes Patel); and (b) because Patel executed a debt subordination agreement – the Standby Creditors Agreement - by which any amounts due Patel must be "determined without reference to the subordination agreement" but "then paid to the beneficiary of the subordination agreement [Santander] to the extent of its valid interest through the subordination agreement." *See In re Smith*, 77 B.R. 624 (Bankr.N.D.Ohio 1987); *cited with approval in In re Plymouth House Health Care Ctr.*, 03-19135, 2005 WL 2589201 (Bankr. E.D. Pa. Mar. 15, 2005).

15. The Trustee disputes Santander's claim, as it relates to the estate, due to Santander's failure to file a continuation statement.

16. Although there may be a dispute as to the priority of the two secured creditors

holding the greatest secured interests in the Debtors Sale Assets, both Patel and Santander consent to the Trustee selling the Sale Assets and to a carve-out of their respective interest, to provide the funds needed for the chapter 7 trustee to liquidate the assets of the estate.

**Carve-Out Agreement**

17. Patel's consent to the sale and consent to enter into a Carve-Out Agreement has been reduced to a writing. See Patel/Trustee Carve-Out Agreement attached hereto as **Exhibit C**. The Trustee seeks bankruptcy court approval herein, pursuant to Fed.Bankr.R.Proc. 9019, for the Carve-Out Agreement with Patel.

18. Santander has agreed, generally to a carve-out agreement for disposition of the Sale Assets for the benefit of the Debtors estate in principal, subject to definitive terms and conditions being reached by Santander and the Trustee. Once Santander and the Trustee have reduced this agreement to a writing, the parties intend to seek Bankruptcy Court approval of that carve-out agreement.

19. The terms and conditions, generally, of the Carve-Out agreement(s) with both Sandanter and Patel are as follows:

a) All Debtor's asset liquidation proceeds arising from the Sale Assets shall be deposited into an account maintained by the Trustee subject to validly perfected liens of Secured Creditors, if any, pursuant to Section 522(b) of the Bankruptcy Code.

b) Santander and Patel agree to subordinate and to carve-out from the collateral of its validly-perfected security interests the following as a carve-out ("Carve-Out"):

c) The Trustee's statutory commission on Santander and Patel's Collateral liquidated and recovered, including the value of any asset liquidated;

d) Reasonable fees and costs of court appointed professionals engaged by the Trustee including, Auctioneers, Sales Agents, Accountants, and Legal Counsel (the "Trustee's Professionals");

e) Actual expenses to maintain and secure Santander and Patel's Collateral including the Debtor's records or data;

f) Payment of claims to unsecured creditors in the amount of ten percent (10%) of the total claims amount on the claims register;

g) Upon Bankruptcy Court approval of the Carve-Out, once reduced to a writing, the Carve-out is continued by Patel and Santander to the Debtor's estate and designated by Patel and Santander solely for the benefit of, and distribution to, allowed chapter 7 claims of this estate, in accordance with priorities set forth in the Bankruptcy Code;

h) Santander and Patel agree that all payments made pursuant to the Carve-Out shall be deemed a consensual surcharge against Santander and Patel's Collateral, respectively.

i) Santander and Patel designate part of the Carve-Out to be used by Trustee to satisfy the chapter 7 administrative claims, including the chapter 7 trustee's commissions (the "Chapter 7 Commissions") and any allowed fees and expenses of any professionals retained or compensated by the chapter 7 trustee (the "Chapter 7 Compensation");

j) The Trustee reserves that right to abandon, in his sole discretion, any property or assets of the estate. Should the Trustee choose not to administer any of Santander or Patel's collateral, Santander and/or Patel shall have the right to seek relief from the automatic stay;

20. Pursuant to 11 U.S.C. § 363(f)(2) and the terms of the Carve-Out Agreement with Patel, attached hereto as **Exhibit C**, Patel consents to the sale.

21. Subject to the above general terms, as well as specific and more definitive terms and conditions to be defined by Santander and the Trustee, Santander consent to the sale of the Sale Assets pursuant to 11 U.S.C. §363(f)(2).

22. The Trustee maintains that, to the extent ***any party*** holds a valid security interest in the Debtor's assets, the Trustee has authority pursuant to §506(c) to pay out of any recovery from any sale, the reasonable, necessary costs and expenses of preserving, or disposing of the assets.

**Agreement of Sale for Sale Assets**

23. The Trustee has entered into an Agreement of Sale to sell the Sale Asset for $87,500.00 to Wenqiang Li (the "Buyer") pursuant to the terms of the Agreement of Sale

("AOS"). The AOS is annexed hereto as **Exhibit "A"**.

24. Buyer agrees to pay in full and final settlement to the Trustee a purchase price of $87,500.00 ("Purchase Price") for the Sale Asset. The Buyer agrees to remit a 10% good faith deposit of $8,750.00, returnable only if the offer is not accepted or approved by the Trustee. The remainder of the Purchase Price is to be paid no later than twenty (20) days after final approval of the sale, free and clear of all liens, claims and encumbrances, by the United States Bankruptcy Court for the Eastern District of Pennsylvania.

25. The Trustee agrees to execute, after the sale of the Sale Assets, a Quitclaim bill of sale substantially similar to the form attached as **Exhibit B**.

25. The Sale Asset will include Pennsylvania liquor license R-1319; LID No. 56332 ("Liquor License").

26. This Motion is brought pursuant to provisions of 11 U.S.C. § 363(b) and (f) for the entry of an order authorizing the sale of this asset of the estate

27. The Trustee has marketed the Sale Assets and believes that this is the highest and best offer for the Sale Asset.

28. The Buyer understands that the sale of the Sale Asset is subject to the Trustee's right to receive and accept higher and better offers for the purchase of the Sale Asset.

**LEGAL ANALYSIS FOR SALE**

29. Section 363(b) of the Bankruptcy Code authorizes the Trustee, after notice and hearing, to sell property of the estate other than in the ordinary course of business. Section 363(f) of the Bankruptcy Code authorizes the Trustee to sell property free and clear of interest.

30. In accordance with Section 363(b) of the Bankruptcy Code, a Trustee is authorized to use or sell property of the estate outside the ordinary course of business upon receipt of Court approval thereof. The Trustee is moving for authorization of the transaction

pursuant to Section 363(b) of the Bankruptcy Code. That provision states, in relevant part, as follows:

> (b)(1) The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.
>
> *11 U.S.C. § 363(b)(1).*

31. Courts within this circuit interpreting Section 363(b)(1) have held that transactions should be approved under Section 363(b)(1) when they are supported by the sound business judgment of management. *See In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (outlining requirements for sale of assets pursuant to Section 363); *In re Phoenix Steel Corp.*, 82 B.R. 334, 335-36 (Bankr. D. Del. 1987) (stating that judicial approval of a Section 363 sale requires a showing that the proposed sale requires a showing that the proposed sale is fair and equitable, a good business reason exists for completing the sale and that the transaction is in good faith); *see also In re Titusville Country Club*, 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991), *In re Industrial Valley Refrig. & Air Cond. Supp.*, 77 B.R. 15, 20 (Bankr. E.D. Pa. 1987).

32. The "sound business purpose" test requires a debtor to establish four elements to sell property outside the ordinary course of business:

a. that a "sound business purpose" justifies the sale of assets outside the ordinary course of business;

b. that adequate and reasonable notice has been provided to interested persons;

c. that the debtor has obtained a fair and reasonable price; and

d. good faith.

*See Titusville Country Club*, 128 B.R. at 399; *In re Sovereign Estates, Ltd.*, 104 B.R. 702, 704 (Bankr. E.D. Pa. 1989); *Phoenix Steel Corp.*, 82 B.R. at 335-36; *Industrial Valley*, 77 B.R. at 21;

*see also Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983). The proposed sale is justified under Section 363(b) because it unquestionably satisfies all of the factors under the "sound business purpose test."

33. Further, the Trustee does not believe that any other alternative will at this time provide a higher value for the assets. Under the circumstances, the sale should be authorized. The sale will allow the trustee to finalize the administration of this case and to file his final report.

34. Buyer's proposed Purchase Price of Eighty Seven Thousand Five Hundred Dollars ($87,500.00) subject to the terms and conditions of the Agreement, represents a fair and reasonable purchase price for the Sale Assets.

35. Based on the information available to the Trustee, including his inspections of the validity of the Liquor License, the advice of his Sales Agent who marketed the Liquor License, and taking into account that the Sale Asset is sold without warranties as to the ultimate value, the Trustee feels the Agreement represents a fair and reasonable purchase price.

36. The Trustee adequately marketed the Liquor License through this Sales Agent and by also listing the Liquor License for sale on the National Association for Bankruptcy Trustee's website.

**Upset Bid Procedures/Auction**

37. Any party interested in purchasing the Liquor License (an "Upset Bidder") should file a notice of an upset bid with the Bankruptcy Court, United States Trustee, and Chapter 7 Trustee (at the address listed below) within the time set by the Bankruptcy Court Clerk for objecting to the Motion to Sell and follow the procedures set forth below (the "Bid Procedures").

38. The Upset Bidder shall submit to special counsel for Trustee an offer, in writing,

in an amount equal to the Alternative Minimum Bid (defined below), and submit information demonstrating the financial wherewithal of the Upset Bidder to consummate the proposed transaction.

39. An Alternative Minimum Bid shall be an amount no less than Eighty Nine Thousand Five Hundred Dollars ($89,500.00).

40. Upset Bidders may not substantially deviate from the terms of the agreement of sale attached hereto as **Exhibit A**. The Trustee, in the Trustee's discretion, will determine if the Upset Bidder has submitted a qualified bid based on the terms of the bid, and review of proof of the Upset Bidder's financial ability to consummate the proposed purchase at the Alternative Minimum Bid price.

41. If a qualified Alternative Minimum Bid is timely received by the Trustee, then the Trustee shall conduct a private auction starting at **8:30 a.m. on July 9**, **2014** in the attorney conference rooms on the second floor of 900 Market Street – across the hall from the court rooms - as determined by the Trustee and/or telephonically. Only Alternative Bidders, as determined by the Trustee, and their professionals may attend the auction. The Trustee will select the bid, or combination of bids, at the conclusion of the auction that the Trustee believes to be the highest or best value for the Liquor License (the "Winning Bidder"). The Trustee reserves the right to select the best bid, even if not the highest bid.

42. The Winning Bidder and any bidder participating in the process must complete and sign all agreements or other documents with the Trustee evidencing and containing the terms and conditions on which the winning or any other bid was made before the auction is concluded.

43. In the event the Winning Bidder is different from the Buyer identified in this Motion to Sell, the Trustee shall ascertain whether the Winning Bidder is an insider of the Debtor, whether the sale represents an arms-length transaction between the parties, made without

fraud or collusion, and whether there has been any attempt by either party to take any unfair advantage of the other such that the Winning Bidder may be deem to be purchasing the Liquor License in good faith pursuant to 11 U.S.C. § 363(m).

44. If for any reason the Winning Bidder fails to consummate the sale of the Liquor License, the offeror of the second highest or best bid (subject to the same reservations) will automatically be deemed to have submitted the highest and best bid, and the Trustee is authorized to effect the sale of the Liquor License to such offeror without further order from the bankruptcy court. If such failure to consummate the purchase of the Liquor License is the fault of the Winning Bidder, the Winning Bidder's deposit, if any, shall be forfeited to the Trustee, pursuant to the terms of the Agreement.

45. The Trustee reserves the right to: (1) impose, at or before the Auction, additional terms and conditions on a sale of the Liquor License; (2) extend the deadlines from those set forth herein, adjourn the auction at the auction; (3) withdraw the Liquor License, or any part of the Property, from sale at any time before or during the auction, and to make subsequent attempts to market the same; and (4) reject all bids if, in the Trustee's reasonable judgment, no bid is for a fair and adequate price.

46. The Trustee has caused to be conducted an investigation as to the value of the Sale Asset. Given the value of the Sale Asset, the Trustee believes that a private sale and/or auction, if one occurs, offers the method by which the Trustee may obtain the highest and best value to the estate.

47. The Trustee in his exercise of his sound business judgment believes that the proposed sale of the Sale Asset is fair and equitable under the facts and circumstances of this case and is in the best interests of the Debtor’s creditors.

48. By this Motion, the Trustee seeks authority to sell the Sale Asset free and clear of

interest pursuant to § 363(f) of the Bankruptcy Code and pursuant to the terms of the AOS.

49. The Trustee is unaware any valid liens or encumbrances on the Sale Asset. To the extent there are any valid liens or encumbrances, the valid liens or encumbrances will attach to the proceeds of the Sale.

50. For the reasons set forth herein, the Trustee respectfully, requests that the Court issue an Order pursuant to 11 U.S.C. §105 and 363(b) and (f) authorizing the Trustee to sell the Sale Assets contemplated the AOS annexed hereto as **Exhibit A**, free and clear of liens and claims.

**LEGAL ANAYSIS FOR CARVE-OUT AGREEMENT APPROVAL**

51. The Trustee, in connection with the Patel Carve-Out Agreement agree that the Trustee is uniquely situated to liquidate the Sale Assets of the estate.

52. The Trustee has requested and Patel has consented to the Sale Assets being subjected to surcharge under 11 U.S.C. §506 (c) to pay the Trustee's Expenses of administration of the Debtor's estate, to the extent referenced above and in **Exhibit C.**

53. In furtherance of the amicable administration of this case for the benefit of all creditors – and as a result of extensive negotiations – the Parties have agreed to the terms and conditions of the attached Carve-Out Agreement by and between Chapter 7 Trustee and Patel, which provides funding for the efficient liquidation of the assets and conclusion of this case. After review of the assets of this estate and the status of liens, claims, interests and encumbrances (the "Liens") the Trustee believes that a settlement based upon the terms set forth herein, is in the best interest of the Estate and of all creditors.

54. Accordingly, the parties agree to and intend to be bound by the Carve-Out as attached hereto as **Exhibit C**, which provides that Patel will agree to subordinate and carve-out of the Proceeds of its validly perfected security interests, the Carve-Out, excluding the Trustee's

fees and costs incurred in connection with any investigations into the Debtor's affairs with its principal or affiliates, for the purposes of any avoidance or recovery actions, the Trustee may determine to bring against them.

54. The Trustee believes that a settlement based upon the terms set forth herein is in the best interest of the estate and all creditors.

55. By this Motion, the Trustee seeks an order pursuant to Rule 9019 of the Bankruptcy Rules approving the Carve-Out attached hereto as **Exhibit C**.

**Basis for Relief**

56. Rule 9019 provides, in relevant part, as follows:

> a) Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

57. Indeed, "compromises are favored in bankruptcy" because they minimize the costs of litigation and further the parties' interest in expediting administration of a bankruptcy estate. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996), *citing Collier on Bankruptcy* ¶ 9019.03[1] (15th ed. 1993).

58. In deciding whether to approve a settlement, a bankruptcy court does not conduct a mini-trial on the merits or engage in an independent investigation into the reasonableness of the proposed settlement, but instead "relies heavily on the trustee" and the court generally defers to the trustee's judgment provided there is "a legitimate business justification" for the settlement. *Martin*, 91 F.3d at 395. Courts will approve a compromise and settlement if it is fair and equitable and in the best interests of the debtor's estate and creditors. *See In re Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998); *In re Culmtech, Ltd.*, 118 B.R. 237 (Bankr. M.D. Pa. 1990); *Kranzdorf v. Green*, 76 B.R.974, 979 (E.D. Pa. 1987).

59. A court may approve a settlement or compromise under Rule 9019 if it falls above "the lowest point in the range of reasonableness." *In re Pennsylvania Truck Lines, Inc.*, 150 B.R. 595, 598 (Bankr. E.D. Pa. 1992), *aff'd*, 8. F.3d 812 (3d Cir. 1993). *In Grant Broadcasting of Phila., Inc.*, 71 B.R. 390, 395-96 (Bankr. E.D. Pa. 1987). To determine whether a proposed settlement falls within the lowest range of reasonableness, courts consider four factors:

b) the probability of success in the litigation;

c) the difficulty in collecting any judgment that may be obtained;

d) the complexity of the litigation involved and expense, inconvenience and delay necessarily attendant to it; and

e) the interest of creditors and stockholders with a proper deference to their reasonable views of the settlement.

60. Probability of Success. The Trustee believes that the positions he has taken to sell the Debtor's Property has merit. However, if the Debtor or Secured Creditor was able to sell this Property in State Court, the Trustee's action would not have merit. Further, the state court proceedings would likely yield substantially less funds, if any, available to creditors compared to the potential settlement contemplated by the Trustee. If the Trustee were unsuccessful in litigation, it would impact unsecured creditor recoveries in this case by drawing resources away from the Debtor's bankruptcy estate. Taking into consideration these factors, the Stipulation is a good result for unsecured creditors.

62. Difficulty in Collecting Judgment. The Trustee is not aware of any difficulty in collecting on any judgment. Therefore, this factor is neutral.

63. Complexity of Litigation Involved and Attendant Expense, Inconvenience and Delay. If the settlement were not approved, the Trustee and the Secured Creditor may have to

bear other significant expenses related to litigation on an evidentiary hearing. These costs ultimately would have an impact on the resources available for funding other matters and distributions.

64. Interests of Creditors. The Stipulation will result in a meaningful recovery to the Debtor's bankruptcy estate. When compared to the potential risks and costs of potential litigation, the Stipulation is well within the range of reasonableness. Clearly, the Stipulation is in the best interest of estate in this case.

WHEREFORE, the Trustee respectfully requests the entry of an Order (1) authorizing the sale of the Liquor License; (ii) allowing the sale of the Liquor License pursuant to the procedures set forth herein; (iii) allowing the sale of the Liquor License free and clear of any liens or encumbrances; (iv) approving the Bid Procedures in the Motion; (v) authorizing the Trustee to enter into the Carve-Out Agreement; and (vi) providing such other and further relief as this Honorable court deems just and equitable.

Dated: May 28, 2014 GELLERT SCALI BUSENKELL & BROWN LLC

/S/ Jennifer M. Zelvin

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